

Executive for A&M

OGC Has Reviewed

17 November 1948

General Counsel

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Per Diem Restrictions in Administrative Instruction

1. The Chief, Budget and Finance Branch, has recommended that there be an agency-wide policy on limitation of time for which per diem may be granted. The Deputy Chief, Management Branch, has recommended that there be no limitation, as employees traveling today lose money on a \$6.00 per diem.

2. It is clearly established that under the provisions of the Subsistence Expense Act of 1926, as amended, (5 U.S.C.A. 823), the heads of the departments and establishments have final authority to prescribe the circumstances under which per diems may be granted. The Attorney General's ruling on this situation is of interest. In Volume 37 of the Opinions of the Attorney General beginning at page 219, he considered the question raised by the Secretary of War whether the Comptroller General might fix a limit of 30 days as a maximum period in which an officer might be allowed per diem while on temporary duty at one place. It appears that the Comptroller General had written to the Secretary of the Navy suggesting that the Navy travel instructions be amended to limit per diem to such a 30 day period, and as a result, this amendment was issued by the Secretary of the Navy. The Secretary of War decided not to issue the regulation and asked the Attorney General if the Comptroller General's suggestions would be controlling. The Attorney General answered that in the law Congress has not declared the intention to limit the period for per diem and that therefore the matter of making regulations governing performance of temporary duty at one place is exclusively within the jurisdiction of the Secretary of War and the President and that the Comptroller General may not go behind the Secretary's decision and must be guided by it.

3. Obviously under this ruling, the Director has authority to limit or to remove limitations on the payments of per diem. We feel, however, that the attitude of the Comptroller General, as expressed in the letter to the Secretary of the Navy cited above, should be given consideration.

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4. The objections to any limitation raised by the Deputy Chief, Management Branch, appear to be based on the fact that people actually traveling lose money at \$6.00 per diem. The limitation, however, is only to temporary duty performed at one place. Per diem is an allowance to make up for extra costs incurred while traveling away from home. Limitations of time have been imposed by various departments on the theory that when an employee stays in one place for an extended period of time, he can make arrangements which lessen or eliminate the extra expense. There are precedents for such limitations in various agencies such as Navy, Army (despite the attitude displayed above), and Interior. Others probably could be found.

5. In the case of the Interior Department, an opinion of the Comptroller General is of interest. The Assistant Secretary of Interior approved a regulation stating that when an official remained at a temporary duty station in excess of 60 days, that place became ipso facto his headquarters, and per diem would necessarily cease. The Secretary of Interior attempted to make an exception to the Department's regulation in a particular instance. The question was put before the Comptroller General as to whether the payment already made could thus be allowed. His ruling in 10 Comp. Gen. 242 stated that inasmuch as the Department's regulation was made under the authority of the Substantive Expense Act of 1926, it had the force and effect of law, and payments contrary thereto by the disbursing agent were as invalid and unauthorized as though they had been expressly prohibited by statute, and therefore allowance could not be made in this instance although the regulation had subsequently been rescinded.

6. The above comments are offered for information in making the administrative determination but in no sense impair the Director's authority to control allowance of per diem up to the legal limit, subject to the over-all regulations approved by the President. Since per diem may be administratively reduced or eliminated at any time, it might be sufficient as an over-all agency policy for the Director to require appropriate officials to review all cases where per diem is paid to an individual on temporary duty at one place for a period of more than 30 or 60 days, with a view to reducing or eliminating per diem at that time if the circumstances warranted such action.

LRH:mbt

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